(1)

No. 05-425

IN THE

Supreme Court of the United States

JOHN GOUDIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW IS WARRANTED TO: (A) RESOLVE THE CIRCUIT CONFLICT CONCERNING THE STANDARDS FOR DETERMINING A SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN THE PLEA PROCESS; (B) DETERMINE WHAT INFORMATION COUNSEL MUST CONVEY TO A DEFENDANT IN ORDER TO SATISFY THE PERFORMANCE PRONG OF THE *STRICKLAND* STANDARD IN THE PLEA PROCESS, INCLUDING WHETHER COUNSEL HAS A DUTY TO KNOW AND DISCUSS THE CLIENT'S SENTENCING EXPOSURE UNDER THE APPLICABLE SENTENCING STATUTES OR GUIDELINES.

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER A PETITIONER SATISFIES THE PREJUDICE COMPONENT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA PROCESS WHERE HIS TESTIMONY THAT HE WOULD HAVE ACCEPTED THE PLEA OFFER BUT FOR COUNSEL'S INEFFECTIVENESS IS SUPPORTED BY "OBJECTIVE EVIDENCE" SUCH AS A SUBSTANTIAL DISPARITY BETWEEN THE SENTENCE IMPOSED AFTER CONVICTION AND THE SENTENCE PROPOSED IN THE PLEA OFFER AND/OR BY CORROBORATING TESTIMONY OF TRIAL COUNSEL.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Goudie v. United States*, No. 04-13328 (11th Cir.February 28, 2005), which affirmed the judgment denying postconviction relief entered by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. A).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on February 28, 2005. (App. A). On May 27, 2005, the court of appeals entered an order denying the petitioner's timely filed petition for rehearing and rehearing en banc. (App. B). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to September 26, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A.

The petitioner and others were indicted for felony violations of various federal fraud statutes. Following a jury trial, the petitioner was convicted as charged and the convictions were affirmed on appeal. *United States v. De Leon, et al.*, 46 Fed.Appx. 617 (11th Cir.2002), *rehearing en banc denied,* 54 Fed.Appx. 935 (11th Cir.2002).

Pursuant to 28 U.S.C. § 2255, the petitioner filed a motion to vacate alleging the ineffective assistance of his trial counsel in violation of the standards for effective assistance of counsel, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as applied to the plea process in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The motion alleged, in pertinent part, that the government advised the petitioner's counsel, Edward O'Donnell, of a pretrial plea offer whereby the petitioner would serve no term of incarceration and not be required to testify. The resulting conviction would be for a misdemeanor. The petitioner alleged that O'Donnell failed to discuss the consequences or advisability of accepting the plea offer versus

the consequences of a jury verdict of guilt and never informed the petitioner of his sentencing exposure under the applicable Federal Sentencing Guidelines or sentencing statutes. Following an evidentiary hearing, the Magistrate Judge found that the petitioner's counsel was ineffective and recommended that the district judge grant the petitioner's motion. The district judge conducted a *de novo* hearing and denied relief. The petitioner appealed and the judgment of the district court was affirmed. The petitioner seeks certiorari review.

B.

The facts of the case recounted in this section are taken from the district judge's "Order Declining to Adopt Report of Magistrate Judge and Denying Petitioner's Motion to Vacate Pursuant to 28 U.S.C. § 2255" which is reported as *Goudie v. United States*, 323 F.Supp.2d 1320 (S.D.Fla.2004).

The petitioner was indicted on four counts of conspiracy and money laundering in violation of 18 U.S.C. §§ 371, 1956(h), 1956(a)(1)(A), and 1956(a)(1)(B). After a ten-week jury trial, the petitioner was convicted on all four counts. The petitioner appealed and the United States Court of Appeals for the Eleventh Circuit affirmed. The petitioner filed a motion to vacate pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel. Following an evidentiary hearing, the Magistrate Judge issued his Report and Recommendation that the motion be granted. The government filed objections and the district judge held a *de novo* evidentiary hearing. *Goudie*, 323 F.Supp.2d at 1321.

The petitioner's trial counsel, Edward O'Donnell, testified that the government was prepared to allow the petitioner to plead guilty to a misdemeanor and that the petitioner would not be required to serve any time nor would he be required to testify at the trial of any co-defendant. O'Donnell testified that he told the petitioner about the plea offer. O'Donnell described the offer to the petitioner as "no time, no testimony." O'Donnell recounted that the petitioner asked: "Ed, why should I plead guilty to anything, I didn't do anything." O'Donnell responded by stating that he admired the petitioner's resolve. O'Donnell testified that after this conversation with the petitioner, he advised the government that the petitioner had decided to go to trial. O'Donnell testified that he and the petitioner did not discuss the

possibility of a plea offer again. The petitioner contended that O'Donnell never discussed the possibility of pleading guilty with him and never told him that the government had offered to allow him to plead guilty to a misdemeanor prior to trial. The petitioner testified that he only learned of the misdemeanor plea offer after the trial when the prosecutor asked him why didn't he accept their offer. The petitioner testified that his response was "what offer?" The prosecutor testified and confirmed this exchange with the petitioner. *Id.* at 1321-22.

The petitioner testified that when he was found guilty after trial, he asked O'Donnell what kind of sentence he was facing "because [he] had never really talked to anybody [about] what [he]was facing" and that O'Donnell answered that he would call him during the next two weeks and explain the sentencing guidelines to him. The petitioner claimed that O'Donnell never called him. The petitioner stated that his wife asked a friend's husband, an appellate attorney, to come to their house and explain the Federal Sentencing Guidelines and the possible sentence under the Guidelines. The attorney came and advised that he was facing incarceration for a term of ten years. The petitioner also stated that prior to his conversation with this attorney, he had not been informed of "the ramifications of the case." However, the petitioner admitted on cross examination that prior to trial, he knew that if he were convicted it would be a "very serious matter" and that he would be going to prison for a long time. The petitioner contended that if the misdemeanor plea offer had been communicated to him by his attorney at the time that it was made, approximately two weeks before the trial started, he would have accepted that offer. He reasoned that his "whole thing was not going to jail," and that he definitely would have accepted an offer that meant he wouldn't have had to go to jail or sit through a trial. *Id.* at 1322-23.

O'Donnell testified that in the course of his representation of the petitioner, he had informed the petitioner that a guilty verdict would result in the petitioner being a convicted felon and that the petitioner could be sentenced to prison time. However, O'Donnell acknowledged that he never discussed with the petitioner, before or after the plea offer, the specific amount of prison time the petitioner was facing under the Sentencing Guidelines. *Id.* at 1323.

In his Report, the Magistrate Judge found that

"O'Donnell's performance was unreasonable under prevailing professional norms because of his failure to adequately advise petitioner about the specific terms of the plea offer and the potential consequences of going to trial." *Id.* at 1324. The Magistrate Judge did not resolve the issue of whether O'Donnell communicated the plea offer to the petitioner. Instead, he found that even assuming O'Donnell's recollection of events were accurate, his brief explanation of the "no time, no testimony" plea offer was insufficient to allow the petitioner to make an informed decision. The Magistrate Judge found that O'Donnell's failure to discuss the advantages and disadvantages of the offer with the petitioner, to review the Sentencing Guidelines with the petitioner, or to explain to the petitioner the advisability of accepting or rejecting the offer, amounted to constitutionally ineffective assistance of counsel. *Id.* at 1324.

The Magistrate Judge further found that the petitioner had successfully demonstrated that O'Donnell's "unreasonable acts or omissions prejudiced him." Specifically, the Magistrate Judge determined that a reasonable probability existed that but for O'Donnell's errors, the petitioner would have accepted the plea offer and pled guilty to a misdemeanor. In reaching this conclusion, the Magistrate Judge relied on the petitioner's testimony, which he found to be "highly credible." In addition, the Magistrate Judge found that O'Donnell's testimony that the offer was "generous" and that he thought that the petitioner was going to be "delighted" with the offer corroborated the petitioner's testimony. Based upon these findings, the Magistrate Judge recommended that the district judge grant the petitioner's Motion to Vacate. *Id.* at 1324-25.

C.

Based upon the foregoing facts, the district judge made the following rulings.

In contrast to the finding of the Magistrate Judge, the district judge found that the petitioner's testimony that O'Donnell never informed him about the misdemeanor plea offer was not credible and further found that O'Donnell's testimony that he communicated the misdemeanor plea offer to his client was credible. *Id.* at 1328-29. (That determination by the district judge was not challenged by the petitioner on appeal and finally resolved the issue whether O'Donnell failed

to convey the plea offer.)

The district judge then turned to the question whether O'Donnell's performance in communicating the plea offer to the petitioner violated the petitioner's Sixth Amendment right to effective assistance of counsel. *Id.* at 1330. After reviewing various decisional authorities, the district judge concluded that in the plea process,

> [t]he case law does not clearly define how much and what kind of information must be conveyed to a defendant in order to satisfy the performance prong of the *Strickland* standard." *Id.*

The district judge found that although it was "clear" that O'Donnell and the petitioner had a conversation about the misdemeanor plea offer prior to trial, "it is equally clear that the conversation was brief and that O'Donnell neither explained how the Federal Sentencing Guidelines would apply to Petitioner or how he should respond to the plea offer." *Id.* at 1331. The district judge noted O'Donnell's testimony "that he never discussed with Petitioner, before or after the plea offer, the specific amount of prison time Petitioner was facing under the Sentencing Guidelines." *Id.*

Nevertheless, the district judge ruled that O'Donnell's failures did not constitute ineffective assistance of counsel in violation of the Sixth Amendment. The district judge rejected the Magistrate Judge's ruling that O'Donnell was ineffective for his failure to explain to the petitioner the minimum and maximum sentences he was facing under the Sentencing Guidelines and applicable statutes. Distinguishing cases where counsel was found ineffective for misinforming the client, *id.* at 1330-31, the district judge found that O'Donnell did not provide incorrect information about sentencing exposure.

While agreeing with the petitioner "that in advising a client whether to accept a plea offer, a criminal defense attorney should evaluate and consider that client's sentencing exposure under the Federal Sentencing Guidelines," and observing that "it would have been preferable if O'Donnell has discussed the Guidelines and Petitioner's possible sentencing exposure under those Guidelines with Petitioner when presenting the plea offer to him," the district judge opined that O'Donnell "merely accepted his client's rational decision to refuse a favorable plea offer." *Id.* 1334-35.

The district judge further reasoned that even if O'Donnell provided ineffective assistance, the petitioner was not entitled to relief because he failed to prove that he was prejudiced pursuant to *Strickland*. According to the district judge, the petitioner was required under *Strickland* to "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1335. The district judge did not address the different test for prejudice in the plea process announced in the post-*Strickland* decision of *Hill v. Lockhart, supra* (holding that a defendant need only show a reasonable probability that, but for counsel's failures, he would have changed his plea). (The difference in the two tests is deemed material in the Fourth and Sixth Circuits as explained in the Argument.) The district judge concluded that the petitioner's testimony that he would have accepted the plea offer was not credible because it was self-serving and not supported by any "objective evidence" because there was "little if any disparity between Petitioner's actual sentence and his sentencing exposure as he understood it at the time he rejected the misdemeanor plea offer. *Id.* at 1335-36.

D.

The district judge issued a certificate of appealability on the following issue: "whether trial counsel was ineffective for inadequately advising the petitioner regarding the terms of [the] plea agreement offered by the government prior to trial and the consequences of refusing the plea offer." (App. C).

E.

On appeal, the petitioner challenged the district judge's failure to apply the test for prejudice in the plea process announced by this Court in *Hill v. Lockhart*. The petitioner also challenged the district judge's conclusion that there was no "objective evidence" to support the petitioner's testimony that he would have accepted the plea offer had he been properly informed and advised by trial counsel. The petitioner cited numerous decisions from other circuits holding that objective evidence is supplied, and prejudice therefore established under *Hill v. Lockhart*, where there is a substantial disparity between the sentence under the plea offer and the

sentence ultimately imposed.

In its decision affirming the district judge's ruling (App. A), the Eleventh Circuit did not address the petitioner's claim that the district judge applied the wrong legal standards for determining prejudice in the plea process.

As for the petitioner's contention that the substantial disparity between the sentence he received and the plea offer sentence constituted objective evidence that corroborated his testimony that he would have accepted the plea offer had he received effective assistance of trial counsel, the Eleventh Circuit stated only the following: "Thus, notwithstanding the great disparity in the sentence exposure between the plea offer and going to trial, Goudie has failed to establish that he would have pleaded guilty but for counsel's errors." (App. A).

REASONS FOR GRANTING THE WRIT

I.

There is conflict among the circuits over whether the test for ineffective assistance of counsel in the plea process announced by this Court in *Hill v. Lockhart* materially differs from the test promulgated in *Strickland*. Ineffective assistance of counsel in the plea process is a recurring claim and the correct standard for its determination is an important issue for resolution by this Court.

Additionally, the district judge in this case noted the dearth of authority addressing defense counsel's duties and obligations in conveying a plea offer to a defendant. The petitioner's counsel acknowledged that he did not inform the client of his sentencing exposure under the Federal Sentencing Guidelines or sentencing statutes, or the advisability or consequences of accepting the government's plea offer versus proceeding with trial. The courts, prosecutors, and defense counsel need to know the requirements that counsel must meet to afford a defendant effective assistance in the plea process.

II.

This case presents a question arising under the Sixth Amendment which has resulted in conflicting answers among the circuits, namely, what is a defendant's burden to establish the prejudice prong of *Strickland* where he claims that his rejection of a plea offer was attributable to the ineffectiveness of his counsel? Certiorari review is sought because the issue is important and recurring.

ARGUMENT

I.

CERTIORARI REVIEW IS REQUESTED TO: (A) RESOLVE THE CIRCUIT CONFLICT CONCERNING THE STANDARDS FOR DETERMINING A SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN THE PLEA PROCESS; (B) DETERMINE WHAT INFORMATION COUNSEL MUST BE CONVEY TO A DEFENDANT IN ORDER TO SATISFY THE PERFORMANCE PRONG OF THE *STRICKLAND* STANDARD IN THE PLEA PROCESS, INCLUDING WHETHER COUNSEL HAS A DUTY TO KNOW AND DISCUSS THE CLIENT'S SENTENCING EXPOSURE UNDER THE APPLICABLE SENTENCING STATUTES OR GUIDELINES.

A.

In order to establish ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must ordinarily satisfy the two elements of *Strickland*. The defendant must first show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Hill v. Lockhart* , this Court held that in evaluating a claim of ineffective assistance of counsel in the plea process, "the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence...." *Id.* at 59, 106 S.Ct. at 370. However, in order to satisfy the "prejudice" requirement, the defendant need only show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. at 370. See also *Roe v. Flores-Ortega* , 528 U.S. 470, 485, 120 S.Ct. 1029, 1039, 145 L.Ed.2d 985 (2000) (reiterating *Hill v. Lockhart* prejudice test and applying similar test for prejudice

to ineffectiveness of counsel claim for failure to file notice of appeal).

Two circuits hold that the difference between *Strickland* and *Hill* concerning the prejudice requirement is meaningful. In *United States v. Griffin*, 330 F.3d 733, 737 (6th Cir.2003), the Sixth Circuit concluded that it is " ... easier to show prejudice in the guilty plea context because the claimant need only show a reasonable probability that he would have pleaded differently." In *Ostrander v. Green*, 46 F.3d 347, 352 (4th Cir.1995) (overruled on other grounds by *O'Dell v. Netherland*, 95 F.3d 1214, 1222 (4th Cir.1996)), the Fourth Circuit explained that a decision of a district judge that applies the *Strickland* test for prejudice in the plea context instead of the test announced in *Hill* must be reversed:

> [T]he district court applied the wrong legal standard to Ostrander's ineffective assistance claim. It used the *Strickland v. Washington* test instead of the more specific *Hill v. Lockhart* standard for guilty pleas induced by ineffective assistance. **There is a significant difference between the tests. Under *Strickland*, the defendant shows prejudice if, but for counsel's poor performance, there is a reasonable probability that the outcome of the entire proceeding would have been different. Under *Hill*, the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial.**

Ostrander, 46 F.3d at 352 (emphasis supplied).

By contrast, in the case at bar, the district judge applied the legal standard for prejudice deemed incorrect by the Fourth and Sixth Circuits in *Ostrander* and *Griffin*. On appeal by the petitioner, the Eleventh Circuit affirmed without noting the district court's claimed error and without drawing any distinction between *Strickland* and *Hill*. The conflict with *Hill* and the need for identification of the correct standard present important issues warranting certiorari review.

B.

In addressing the question whether O'Donnell's performance in communicating the plea offer to the petitioner

violated the petitioner's Sixth Amendment right to effective assistance of counsel, the district judge noted that in the plea process,

> [t]he case law does not clearly define how much and what kind of information must be conveyed to a defendant in order to satisfy the performance prong of the *Strickland* standard.

Id.

Certiorari review would afford this Court the opportunity to provide guidance to the courts, prosecutors, and defense counsel on this critical facet of the criminal justice system. Sentencing statutes and guidelines are increasingly complex. The need for a minimal level of competent representation in the plea process cannot be disputed.

The Court is respectfully requested to grant review so that the duties and obligations of defense counsel in the plea process concerning sentencing can be explored and determined.

II.

CERTIORARI IS SOUGHT TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER A PETITIONER SATISFIES THE PREJUDICE COMPONENT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA PROCESS WHERE HIS TESTIMONY THAT HE WOULD HAVE ACCEPTED THE PLEA OFFER BUT FOR COUNSEL'S INEFFECTIVENESS IS SUPPORTED BY "OBJECTIVE EVIDENCE" SUCH AS A SUBSTANTIAL DISPARITY BETWEEN THE SENTENCE IMPOSED AFTER CONVICTION AND THE SENTENCE PROPOSED IN THE PLEA OFFER AND/OR BY CORROBORATING TESTIMONY OF TRIAL COUNSEL.

The district judge in this case concluded that even if the petitioner's trial counsel was ineffective for failing to have advised the petitioner in the plea process about sentencing exposure, Sentencing Guidelines, and the consequences of accepting the plea offer versus proceeding to trial, the petitioner was not prejudiced. The judge reasoned that the petitioner could not show prejudice, as required for relief under the second prong of *Strickland*, "simply by asserting in hindsight that he would have accepted a plea agreement" had he been properly represented and informed. (R25-31-32). Citing *Paters v. United States*, 159 F.3d 1043 (7th Cir.1998) and *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir.1998), the district judge ruled that the petitioner was required to offer "objective evidence" in support of a showing of prejudice. Finding no such evidence, the district judge concluded that the petitioner's self-serving testimony that he would have accepted the plea was not credible.

On appeal to the Eleventh Circuit, the petitioner argued that his testimony was indeed supported by "objective evidence" in at least two respects: first, the substantial disparity between the sentence under the plea offer (no incarceration, no felony conviction) and the petitioner's exposure to a maximum term of incarceration for 10 years upon conviction after trial as well as the 60-month sentence and felony convictions ultimately imposed; and second, the corroborating testimony of the petitioner's trial counsel.

In support of his argument, the petitioner relied upon

decisions of several courts of appeals holding that "objective evidence" is established, thereby satisfying the prejudice requirement of *Hill v. Lockhart*, where the record shows a substantial disparity between a defendant's actual maximum sentencing exposure under the Sentencing Guidelines and the sentencing exposure incorrectly represented by defense counsel. Under this rule, the disparity is deemed sufficiently "objective" to establish a reasonable probability that the defendant would have accepted the plea offer. See *e.g.*, *Riggs v. Fairman*, 399 F.3d 1179, 1183-84 (9th Cir.2005); *Mask v. McGinnis*, 233 F.3d 132, 142 (2d Cir.2000); *Gordon*, 156 F.3d at 381; *United States v. Day* , 969 F.2d 39 (3d Cir.1992). Here, the petitioner faced a maximum prison term of 10 years upon conviction and his actual sentence upon conviction was five years. The plea offer, by contrast, was tantamount to a traffic ticket -- a misdemeanor plea, no incarceration, no requirement to testify.

Various courts of appeals hold that objective evidence can also be established by the testimony of a defendant's trial counsel that corroborates the critical aspects of his client's testimony. In *Boria v. Keane*, 99 F.3d 492 (2d Cir.1996), the defendant substantiated his allegation of prejudicial ineffective assistance with the testimony of his counsel who "made clear" that he never discussed with his client the advisability of accepting or rejecting the plea offer. *Boria*, 99 F.3d at 495. Boria's trial counsel testified that he "never gave his client any advice or suggestion" as to how to deal with the plea bargain. *Id.* at 497-98. Similarly in *United States v. Day*, 969 F.2d 39 (3d Cir.1992), the Third Circuit remanded for an evidentiary hearing noting that defense counsel's corroborative testimony "might qualify as sufficient confirming evidence."

In this case, the testimony of O'Donnell strongly corroborated his client's testimony. O'Donnell acknowledged that he failed to advise the petitioner whether to accept the plea offer and failed to inform the petitioner of sentencing exposures. But in the Eleventh Circuit, such testimony does not constitute "objective evidence." In other circuits, a criminal defense attorney's testimony acknowledging such failures is accorded great weight and deemed to be substantial objective evidence. See *Boria, supra*; *Day, supra.*

Contrary to the impression the decision of the Eleventh Circuit might initially convey, this is not a case that called

for summary affirmance on the ground that the district judge made an unreviewable credibility determination. Rather, this case involves important constitutional questions about the correct legal standards to be applied and the proof required to establish prejudice under *Hill v. Lockhart*. Other circuits have addressed these questions at length. Indeed, had the petitioner's case arisen in one of the other circuits cited above, his testimony, along with that of his trial counsel, and consideration of the sentencing disparities, would have been deemed sufficient to establish prejudice. Certiorari review is respectfully requested for consideration and clarification of these important questions.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33158
(305) 670-1441

Counsel for Petitioner

DATED: September 2005

No. 05-425

IN THE

Supreme Court of the United States

JOHN GOUDIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

INDEX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 28 2005
THOMAS K. KAHN
CLERK

No. 04-13328
Non-Argument Calendar

D.C. Docket Nos. 03-21071-CV-JAL
97-00582-CR-JAL

JOHN GOUDIE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 28, 2005)

Before DUBINA, HULL and WILSON, Circuit Judges.
PER CURIAM:

Appellant John N. Goudie, a federal prisoner proceeding through counsel, appeals the district court's denial of his 28 U.S.C. §2255 motion to vacate, set aside, or correct his sentence. On appeal, Goudie argues that he was denied effective assistance of counsel in the plea process, asserting that (1) counsel's failure to discuss with him the possible sentences under the federal sentencing guidelines and the consequences of rejecting the plea offer was unreasonable; and (2) counsel's failure prejudiced him. With regard to counsel's competency, Goudie does not challenge the factual findings by the district court, but argues that those facts do not support the district

court's conclusion that he was afforded effective assistance. Citing cases from other circuits, he argues that his rejection of the plea offer was uninformed because he was not advised on the consequences of rejecting the plea offer and received no advice on the plea offer. With regard to prejudice, Goudie argues that his testimony, corroborated by (1) the substantial disparity between the plea offer sentence and the possible sentence upon conviction and (2) counsel's testimony, showed that there was a reasonable probability that he would have accepted the plea offer.

An ineffective assistance of counsel claim is a mixed question of law and fact that is subject to *de novo* review. *Hagins v. United States*, 267 F.3d 1202, 1204 (11th Cir. 2001). To prevail, the defendant must demonstrate both that (1) his counsel's performance was deficient, *i.e.*, the performance fell below an objective standard of reasonableness, and (2) he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct 2052, 2064-65, 80 L.Ed.2d 674 (1984). To meet the deficient performance prong of the *Strickland* test, the defendant must show "that counsel made errors so serious that [he or she] was not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (internal quotation marks omitted). There is a strong "presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2065. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985), the Supreme Court applied the *Strickland* test to ineffective assistance of counsel claims involving guilty pleas. The Court noted that, in the context of guilty pleas, the performance prong of the *Strickland* test remains whether counsel's representation was "within the range of competence demanded of attorneys in criminal cases." *Id.* at 56-57, 106 S.Ct. at 369. With regard to the prejudice prong, the Court held that the inquiry focused on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58-59, 106 S.Ct. at 370. We have applied *Hill* to

ineffective-assistance-of-counsel claims by defendants who reject a guilty plea. *Coulter v. Herring*, 60 F.3d 1499, 1503-04 n. 7 (11th Cir. 1995) (citations omitted).

We have stated that, "[w]hen a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences." *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. Unit B March 1981) (citation omitted)[1]. "It is equally essential that the attorney advise a defendant of possible consequences where...the defendant withdraws a negotiated guilty plea and stipulated sentence in the minimum range and instead stands trial and faces the maximum sentence." *Id.* We have also stated that, to enable the defendant to make an informed and conscious choice between accepting the prosecution's offer and going to trial, counsel must "offer his informed opinion as to the best course to be followed in protecting the interests of his client." *Wofford v. Wainwright*, 748 F.2d 1505,1508 (11th Cir. 1984) (citation omitted) (discussing the interests of a defendant who pleads guilty in considering whether the district court violated due process by adopting the magistrate's credibility findings without hearing live testimony bearing on the defendant's ineffective-assistance-of-counsel-claim). Such interests include "having, before he judges the desirability of the plea bargain, a general knowledge of the possible legal consequences of facing trial." *Id.* However, [t]he right to competent plea bargain advice is at best a privilege that confers no certain benefit....An accused may make a wise decision even without counsel's assistance, or a bad one despite superior advice from his lawyer." *Id.*

Where a defendant challenges a not-guilty plea based on ineffective assistance of counsel, he "must show that there is a reasonable probability that, but for counsel's errors, he would...have pleaded guilty and would [not] have insisted on going to trial." *Coulter*, 60 F.3d at 1504 (internal quotation and citation omitted)

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

(alteration in original); *see also Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (finding no prejudice where a defendant did not allege that but for counsel's errors, he would have accepted the plea offer). In *Diaz*, we held that the defendant failed to establish prejudice where the defendant (1) had not "allege[d] that but for his attorney's errors, he would have accepted the plea offer" and (2) had cited "no evidence to indicate that prior to his conviction he expressed any desire to plead guilty." 930 F.2d at 835. We concluded that, "given [the defendant's] awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, [was] insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer." *Id.* (citing *Johnson v. Duckworth*, 793 F.2d 898, 902 n.3 (7th Cir. 1986) (noting that it was "seriously doubtful" whether a defendant's after the fact testimony regarding his desire to plead guilty alone would be sufficient to establish prejudice)). We further noted that the defendant "ha[d] not established facts that, if proven, would entitle him to relief." *Id.*

Even if counsel was constitutionally required to advise Goudie on whether or not to accept the plea offer and/or explain his sentencing exposure under the guidlines, we conclude from the record that Goudie has failed to show prejudice. See *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) (a reviewing court need not address the performance prong of the test if the defendant cannot meet the prejudice prong, or vice versa). In the instant case, the district court explicitly found that Goudie's testimony regarding his desire to plead guilty was not credible. The district court's credibility determination is normally entitled to deference because as a fact finder, it is in a better position than a reviewing court to assess the credibility of witnesses. *United States v. Ramirez-Chilel*, 289F.3d 744, 749 (11th Cir. 2002). Goudie has advanced no basis for us to reject the district court's credibility determination, and none could be discerned. Nor has Goudie presented any evidence showing his desire to plead guilty prior to conviction. Thus, notwithstanding the great disparity in the sentence exposure between the plea offer and going to trial, Goudie has failed to establish that he would have pleaded guilty but for counsel's errors. Because Goudie has failed to prove that his counsel was ineffective, we affirm the district court's denial of Goudie's § 2255 motion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13328

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 27 2005
THOMAS K. KAHN
CLERK

JOHN GOUDIE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: DUBINA, HULL and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-21071-CIV-LENARD/BANDSTRA

JOHN GOUDIE,
Movant
vs.
UNITED STATES OF AMERICA,
Respondent.
_____/

FILED by___D.C.
JUL 21 2004
CLARENCE MADDOX
CLERK, U.S. DIST. CT.
S.D. OF FLA.-MIAMI

ORDER GRANTING MOTION FOR CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court on a Notice of Appeal (D.E.26), filed July 1, 2004, by Movant John Goudie, and construed as a Motion for Certificate of Appealability ("COA"). Having reviewed the Motion and the record, the Court finds as follows:

On June 21, 2004, the Court denied Movant's Motion to Vacate Sentence pursuant to 28 U.S. C. § 2255. (D.E. 25). The Court must now determine whether a Certificate of Appealability ("COA") shall issue in this case based on the Notice of Appeal, which it now construes as a Motion for Certificate of Appealability. See Edwards v. United States, 114 F.3d 1083, 1084-85 (11th Cir.1997) (citing 28 U.S.C. § 2253 ©)). Generally, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 ©)(2). Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 ©)) is straightforward: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where a district court has denied a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

In the instant case, the Court dismissed Petitioner's habeas petition on substantive grounds. In doing so, the Court declined to adopt the Magistrate Judge's recommendation that Petitioner's Motion to Vacate be granted. In light of the difficulty of the issues raised by Petitioner in his Motion to Vacate, the Court finds that Petitioner has met the standard for COA on the sole issue arising from his Motion:

(1) whether trial counsel was ineffective for inadequately advising Petitioner regarding the terms of plea agreement offered by the government prior to trial and the consequences of refusing the plea offer.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Notice of Appeal (D.E.26), filed July 1, 2004, by Movant John Goudie, and construed as a Motion for Certificate of Appealability, is **GRANTED**, consistent with this Order.

2. A Certificate of Appealability **SHALL ISSUE** in accordance with the above analysis and pursuant to 28 U.S.C. § 2253(c).

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of July, 2004.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc U.S. Magistrate Judge Bandstra
All counsel of record
CASE NO.3-21071-CIV-LENARD/BANDSTRA

(3)

No. 05-425 SEP 19 2005

IN THE

Supreme Court of the United States

JOHN GOUDIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-21071-CIV-LENARD/BANDSTRA
(97-582-CR-LENARD)

JOHN N. GOUDIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on John N. Goudie's Motion under 28 U.S. C. §2255 to Vacate, Set Aside, or Correct Sentence (D.E. 1) filed on April 29, 2003. On May 21, 2003, this motion was re-assigned to United States Magistrate Judge Ted E. Bandstra by the Clerk of Court for appropriate resolution in accordance with 28 U.S.C. §636(b). Accordingly, the undersigned conducted an evidentiary hearing on this matter on July 21, 2003. Having carefully considered the motion, the government's response, argument of counsel, the underlying court file and applicable law, the undersigned respectfully recommends that Petitioner's Motion to Vacate be GRANTED for the reasons explained below.

FACTUAL AND PROCEDURAL HISTORY

On July 28, 1997, a federal grand jury sitting in the Southern District of Florida returned an indictment charging John Goudie (hereinafter "petitioner") and others with various federal offenses committed during two related conspiracies. First, defendants were charged with a scheme to violate federal fraud statutes by inducing lenders to make improvident mortgage loans. Second, defendants were charged with a scheme to launder monetary proceeds derived from those mortgage frauds in order to promote further misconduct and to conceal the origins of the funds so earned.

On December 14, 1998, petitioner was found guilty on all charged offenses; and on May 14, 1999, he was sentenced to a term of

sixty (60) months imprisonment, to be followed by three years of supervised release. Petitioner was ordered to pay restitution in the amount of $378,278.00 and specially assessed $250.

On May 18, 1999, petitioner filed a Notice of Appeal. On July 17, 2002, the Eleventh Circuit Court of Appeals affirmed petitioner's conviction and sentence. On April 7, 2002, the Supreme Court denied a petition for writ of certiorari. Goudie v. United States, 123 S.Ct. 1763 (2003).[1]

Petitioner now moves to vacate his sentence pursuant to 28 U.S.C. §2555, claiming that his trial counsel failed to communicate a plea offer by the government prior to trial which he would have accepted had he known of its terms. Specifically, petitioner argues that the prosecution, prior to trial, extended him an offer to plead guilty to a misdemeanor charge as a lesser included offense of the charges set forth in the indictment which would have required no trial testimony and resulted in no term of incarceration (a "no time, no testimony" plea offer). Evidentiary Hearing Transcript, pg. 11. A plea to a misdemeanor charge would also have eliminated the consequences of a felony record, which petitioner now faces as a result of his conviction.

Petitioner claims that his trial counsel, Edward O'Donnell, never communicated to him the misdemeanor plea offer and instead proceeded to trial. Further, petitioner asserts that Mr. O'Donnell failed to review with him the consequences of accepting the plea offer versus his exposure to incarceration if his trial defense was unsuccessful.

Petitioner testified at the evidentiary hearing on this motion and explained that he first heard of the plea offer, but not its specific terms, after the jury returned its verdict of guilty. Petitioner recalls approaching the prosecutors, AUSA Alexander Anguiera and AUSA Thomas Mulvihill, to personally inquire whether something could be done so the he would not be remanded to following his conviction. AUSA Mulvihill told petitioner that he should have accepted the plea

---

[1] Presently, the defendant is out on bond pending final resolution of his appeal and is scheduled to commence his sentence on or about August 31, 2003.

offer proposed by the government. Petitioner expressed shock and concern and stated that he had not been informed of any plea offer by his trial counsel so that he had not considered the possibility of avoiding the risk and expense of a trial.

Upon obtaining additional counsel for sentencing[2], petitioner advised Mr. Nields that a plea offer, the details of which he did not know, was apparently communicated to his trial counsel but was not relayed to him. Petitioner inquired whether this should be brought to the Court's attention at sentencing but his counsel advised that petitioner would need to present such issues after his direct appeal and in the form of a habeas petition.[3]

Petitioner also argues that his trial counsel, Mr. O'Donnell, never informed him of his exposure to incarceration or the sentencing guidelines he would face if convicted at trial. Petitioner's statement is corroborated by Mr. O'Donnell who testified that he assumed the petitioner was aware of the guidelines. Following his conviction, petitioner was advised for the first time of the applicable sentencing guidelines by appellate lawyer, David Garvin, Esq.

FACTUAL FINDINGS

A habeas corpus petitioner is entitled to an evidentiary hearing on his claims if he alleges facts which would entitle him to relief. Smith v. Singletary, Jr. 179 F. 3d 1051, 1053 (11th Cir. 1999). A district court, however, need only conduct an evidentiary hearing if it cannot be conclusively determined from the record whether a

---

2

Goudie was represented by John Nields, Jr., Charles Graf and trial counsel Edward O'Donnell at his sentencing hearing.

3

Petitioner's failure to raise and ineffective assistance of counsel claim on appeal does not preclude this Court from granting relief since the habeas petition was the appropriate means of raising this issue. "Typically, claims of ineffective assistance of counsel are inappropriate on direct appeal and should be raised, instead, in habeas corpus proceedings." U.S. v. Rivera-Sanchez, 222 F.3d 1057,1060 (9th Cir. 2000).

petitioner was not denied effective assistance of counsel. Id. at 1053. If an evidentiary hearing is held, the district court is in the best position to observe the demeanor of the witnesses and to assess their credibility. Such factual findings shall not be set aside unless clearly erroneous. United States v. Risken, 869 F.2d 1098 (8th Cir. 1989) (quoting Anderson v. City of Bessemer, 470 U.S. 564, 573-574 (1985)). Here, the trial record reveals no facts with regard to petitioner's current claim so that an evidentiary hearing was conducted by the undersigned on July 21, 2003. The Court heard testimony from petitioner's attorney, Mr. O'Donnell, from former AUSA Alexander Aguiera, from co-defendant, Julio Marrero, from petitioner's brother, Joseph Goudie, and from petitioner, John Goudie.[4]

Petitioner contends that Mr. O'Donnell, his trial counsel, provided ineffective assistance during the course of his trial proceedings by (a) failing to inform him of the misdemeanor plea offer extended by the government, and (b) failing to explain the potential consequences of not accepting the plea if convicted on the felony charges. Instead, petitioner says he was repeatedly told by his attorney that a co-defendant would testify for him at trial making his acquittal almost a foregone conclusion. However, at trial, the co-defendant did not testify and petitioner was convicted.[5]

Mr. O'Donnell, on the other hand, testified that he did inform petitioner of the government's plea offer by communicating its basic

---

[4] Additionally, the Court requested and accepted a written statement from Mr. John Nields, Jr., sentencing and appellate counsel, with respect to his knowledge on related matters. Mr. Nields offers no additional information on any relevant issues.

[5] Mr. O'Donnell also testified that even when it was determined that the exculpatory witness would not testify on his client's behalf, he did not seek to determine if petitioner would accept the plea offer. Rather, Mr. O'Donnell assumed the plea was "off the table," without seeking confirmation for that assumption from the government. Evidentiary Hearing Transcript, pg. 19.

terms. Mr. O'Donnell's recollection of the matter is fairly scant. Although Mr. O'Donnell recalls telling petitioner that the government offered him a plea of "no time, no testimony" to a misdemeanor, Mr. O'Donnell indicated he did not recall if this was one or two weeks prior to trial. Evid. Hrg. Transcript, pg. 11. Further, he recalled that the conversation was very brief and occurred in the lobby of one of the federal courtrooms. Id., pg. 15. Mr. O'Donnell indicated he did not prepare notes, letters or memoranda reflecting this brief conversation. Id., pg. 15. Mr. O'Donnell did not request the prosecution to put its offer in writing-so that he never reviewed any written terms with his client. Id., pg. 14. Further, Mr. O'Donnell testified that he did not review the sentencing guidelines with petitioner of the potential consequences of going to trial versus accepting the misdemeanor plea offer. Id., pg. 16. Mr. O'Donnell testified that he assumed that petitioner was aware he was exposed to incarceration since "he had been in the case a long time before [Mr. O'Donnell] was." Id., pg. 16.

LEGAL ANALYSIS

A defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance of counsel." Strickland, 466 U.S. at 689. To prevail on an ineffective assistance of counsel claim, a habeas corpus petitioner must show: (1) that his attorney's performance was, under all circumstances, unreasonable under prevailing professional norms, and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result...would have been different." Id., at 687-694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694. Yet, when analyzing ineffective assistance claims, reviewing courts must indulge a strong presumption that trial counsel's conduct fell within the wide range of reasonably professional assistance. Id. at 689. In Hill v. Lockhart, 474 U.S. 52, 57-58 (1985), the Supreme Court extended the application of the Strickland test to claims of ineffective assistance of counsel arising out of the plea negotiation process. Therefore, this standard applies where a defendant foregoes a plea offer based on counsel's erroneous advice.

A. Unreasonable Performance

Based on the facts as stated above, the undersigned first finds Mr. O'Donnell's performance was unreasonable under prevailing professional norms because of his failure to adequately advise petitioner about the specific terms of the plea offer and the potential consequences of going to trial. Under Strickland, trial counsel had an obligation to consult with his client on important decisions and to keep him informed of important developments throughout the course of the prosecution. Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991); see also, Strickland v. Washington, 466 U.S. at 688. "The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case...[and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision." Boria v. Keane, 99 F.3d 492, 496-497 (2d Cir. 1996) (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 201, at 339 (1988)). Therefore, a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Purdy v. United States, 208 F.3d 41, 49 (2d Cir. 2000); see also, Model Rules of Professional Conduct Rule 1.4 (b) (1995).

Analyzing this objectively reasonable standard here, the undersigned finds that Mr. O'Donnell failed to effectively assist petitioner with respect to a critical aspect of his case, namely the government's plea offer and the pros and cons of accepting or rejecting this offer. Mr. O'Donnell testified that he generally advised petitioner of the misdemeanor plea offer by communicating the offer to petitioner in a hallway or lobby of one of the federal buildings. Mr. O'Donnell never sat down with petitioner to discuss the offer in detail or to present him with the ramifications of the offer. Although Mr. O'Donnell testified that he recalls telling petitioner that he was offered a misdemeanor, "no time, no testimony" plea, it is evident from his testimony that the details and ramifications of such a plea offer were never communicated to petitioner which precluded him from truly appreciating the importance of the offer or what was actually being offered by the prosecution. Also, Mr. O'Donnell did not provide his professional guidance to petitioner as to the benefits of accepting the misdemeanor plea offer versus his criminal exposure

to felony charges at trial. Rather, Mr. O'Donnell merely told petitioner that he respected his decision to not accept the plea offer without questioning the basis or wisdom of that decision. Evid. Hrg. Transcript, pg. 11.

In so finding, the undersigned is aware that in an given case, there are countless methods by which effective assistance of counsel can be provided to a criminal defendant. Purdy, 208 F.3d at 45. Also, since defendant are more likely to second-guess their counsel's assistance after a conviction, judicial scrutiny of a defense attorney's performance must be highly deferential. Diaz v. United States, 930 F.2d at 835. For this reason, the court must indulge a "strong presumption" that defense counsel's conduct falls within the wide range of reasonable professional assistance. Slevin v. United States, 71 F.Supp.2d 348,354 (S.D.N.Y. 1999). On a claim of ineffective assistance of counsel, a petitioner must overcome a strong presumption of attorney competence. Id. However, since an accused is entitled to rely on his counsel...to offer his informed opinion as to what plea should be entered, the obstacle of overcoming a strong presumption of attorney competence can be established by focusing on counsel's behavior. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948). At a minimum, counsel must communicate to his client the terms of a plea offer, and inform the client of the strengths and weaknesses of the case against him. Purdy, 208 F.3d at 45; Diaz, 930 F.2d at 834; Pater v. United States, 150 F.3d 1043, 1046 (7th Cir. 1998).

Furthermore, knowledge of the comparative sentencing exposure between standing trial and accepting a plea offer will often be crucial to the decision of whether to plead guilty. United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). Accordingly, a defense lawyer must explain to his client the maximum sentencing exposure he would face were he to elect to go to trial. United States v. Gordon, 156 F.3d 376, 380 (2d Cir. 1998). Defense counsel, employing the U.S. Sentencing Guidelines Manual, does not need to provide his client with an estimate of the probable sentencing range, but should, however, explain the maximum and minimum statutory penalties applicable to the charges faced. Slevin, 71 F.Supp.2d at 354. Because the guidelines are often complicated, it is the defense attorney's duty to explain their application to his client. Id.

While petitioner and Mr. O'Donnell disagree about whether

a plea offer was ever communicated prior to trial, Mr. O'Donnell's testimony alone is sufficient to overcome the strong presumption of attorney competence here. Slevin, 71 F.Supp.2d at 354. The brief communication recalled by Mr. O'Donnell of a "no time, no testimony" plea offer did not constitute a sufficient communication of the offer to allow for an informed decision by petitioner. Von Moltke, 332 U.S. at 721. It is undisputed that Mr. O'Donnell never sat down or took time with petitioner to discuss the advantages and disadvantages of the offer in terms of the sentence to which he was exposed on the felony charges. Thus, even assuming that the plea offer was mentioned, the information provided by Mr. O'Donnell concerning the offer was insufficient and unreasonable under the circumstances of this case.

In a similar case, Boria v. Keane, 99F.3d 492 (2d Cir. 1996), petitioner's counsel testified that he had never discussed with his client the advisability of accepting or rejecting a plea offer in a criminal prosecution. Boria, 99 F.3d at 495. The court held that counsel's failure to discuss with the defendant the advisability of accepting or rejecting the plea offer, particularly when accepting the offer was clearly in the defendant's best interests, deprived the defendant of constitutionally required advice in violation of his right to effective assistance of counsel. Id. at 496-97.

Likewise, in United States v. Day, 969 F.2d 39 (3d Cir. 1992), a habeas petitioner conceded that he had been notified about the terms of a plea offer but alleged that the advice received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer. Id. at 42. The Third Circuit held that a valid Sixth Amendment claim was presented because knowledge of the comparative sentence exposure between standing trial and accepting a plea offer was crucial in deciding whether to plead guilty. Id. at 43. Morever, familiarity with the structure and basic content of the sentencing guidelines is mandated in order for counsel to give effective representation. Id. at 44. Here, it is undisputed that Mr. O'Donnell never reviewed the sentencing guidelines with petitioner because Mr. O'Donnell assumed petitioner was familiar with those guidelines. The Sixth Amendment requires

more and failing to do so-particularly in view of a misdemeanor plea offer-was unreasonable under the circumstances.[6]

B. Prejudice

To satisfy the second Strickland factor, a petitioner must demonstrate that "counsel's unreasonable acts or omissions prejudiced him" Chu Young Yi v. Gearinger, 139 F.Supp. 2d 1393, 1410 (11th Cir. 2001). Prejudice is demonstrated when a petitioner proves a "reasonable probability that, but for counsel's unprofessional errors, the result...would have been different." Strickland, 466 U.S. at 687-694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Chu Young Yi, 139 F.Supp.2d at 1410. In the case at hand, in order to prove prejudice, petitioner is required to show that (1)he would have accepted the plea offer with the advice of competent counsel, and (2) the trial court would have accepted the plea.[7]

Analyzing this factor, the undersigned finds from the testimony presented at the evidentiary hearing that petitioner satisfies

---

6

In so finding, this Court does not hold that counsel "must give each defendant anything approaching a detailed exegesis of the myriad arguably relevant nuances of the Guidelines" in order to comply with the Sixth Amendment. Day, 969 F.2d at 44. Nevertheless, a defendant has the right to make a reasonably informed decision whether to accept a plea offer, and therefore a defense counsel must always communicate to the defendant the terms of any plea bargain offered by the prosecution. Id.; Cullen v. United States, 194 F.3d 401, 404 (2d Cir. 1999) (defense counsel's performance was deficient insofar as he failed to inform defendant of the terms of offered plea bargain and failed to offer any advice as to whether the plea bargain should be accepted).

7

It is presumed that the trial court would have accepted the petitioner's plea to a misdemeanor charge since other defendants with similar or greater involvement were allowed to accept the same or similar pleas.

both. First, petitioner has established that there is a reasonable probability that he would have accepted the misdemeanor plea offer extended by the government had he known of its terms and potential consequences. Generally, a petitioner is required to present objective evidence beyond his own self-serving, post conviction testimony that demonstrates a reasonable probability that he would have accepted the plea offer. Alvernaz, 831 F.Supp. at 793. "A defendant's self-serving statements-after trial, conviction, and sentence that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently." Id. Here, petitioner has presented believable testimony that supports his contention that he would have accepted the plea offer had he known of its terms of the true exposure he faced on the felony charges. Petitioner testified that if Mr. O'Donnell would have conveyed the offer, he would have "of course" taken it. Evid. Hrg.Transcript, pg.31. He further stated, "I would have taken any plea offer... I heard that the government wins 90 something percent of their cases. I certainly wasn't going to go to court if I had a plea offer on the table." Id., pg 35. In addition, petitioner offer objective reasons as to why he would have accepted the offer. Petitioner stated: "I wouldn't have been facing what I am facing now, which is 5 years, and I would have saved a lot of money and a lot of grief that I have had for the last 5 years." Id., pg. 31.

In addition to petitioner's testimony, Mr. O'Donnell's recollections provide further objective evidence that petitioner would have accepted the plea. At the evidentiary hearing, Mr. O'Donnell testified that he believed the plea offer was a generous offer. Id., pg. 13. He further stated that petitioner was going to be "delighted" with the offer. Id., pg. 14. Therefore, the undersigned finds that had petitioner been fully informed of the plea offer, and understood it, he most likely would have accepted it.[8]

---

[8] The Government argues that because petitioner asserted and continues to assert his innocence that he would not have accepted the offer despite the fact that it was so beneficial. The Court is aware that a defendant proclaiming his

While the burden is on petitioner to prove by a preponderance of the evidence that there is a reasonable probability that he would have accepted the plea offer if properly conveyed, Strickland does not require petitioner to prove this to a certainty. Day, 969 F.2d at 45; see also, Hill v. Lockhart, 474 U.S. 52 (1985). Here, the plea offer extended by the government was clearly a generous one, and accepting it merited little if any consideration. For all of these reasons, the undersigned concludes that petitioner has established a reasonable probability that, absent his counsel's substandard performance, he would have accepted the plea offer and avoided the felony conviction. As such, the undersigned finds that petitioner was prejudiced by his counsel's ineffective advice by demonstrating a reasonable probability that, but for counsel's errors, the result would have been different.

SUMMARY AND RECOMMENDATION

In summary, the undersigned finds that defense counsel was constitutionally required to discuss with petitioner the advisability of accepting the offered plea and the potential consequences of failing to do so. Trial counsel's failure to do so violated petitioner's right to effective assistance of counsel under the Sixth Amendment. Based on the evidence, petitioner would have accepted the offered plea if counsel had advised him of the terms of the offer in detail and the consequences of the plea if counsel had advised him of the terms of the offer in detail and the consequences of the plea versus exposure to incarceration upon conviction. Further, trial counsel's unequivocal testimony that he never advised petitioner as to the ramifications of

---

innocence might refuse to plead to the indicted charge. However, in the instant case, petitioner's continued assertion of his innocence is not in conflict with his testimony that he would have accepted the plea offer. The undersigned arrives at this conclusion because petitioner was not asked to plea to the indicted felony charges but rather to a misdemeanor with the recommended imposition of no jail time. Further, the undersigned finds that petitioner's testimony that he would have accepted the plea highly credible.

the offered plea precludes the application of the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.

Based on the foregoing reasons, the undersigned respectfully recommends that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence be GRANTED.[9]

The parties may serve and file written objections to this Report and Recommendation with the Honorable Joan A. Lenard, United States District Judge, within ten (10) days of the receipt. See 28 U.S.C. § 636 (b) (1) (c); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); Hardin v. Wainwright, 678 F.2d 589 (5th Cir. Unit B 1982); see also Thomas v. Arn, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED this 7th day of August, 2003, in Miami, Florida.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:
Honorable Joan A. Lenard
Reemberto Diaz, Esq.
(305) 285-9110
Thomas J. Mulvihill, AUSA

[9] The undersigned does not address any further proceedings which may be necessary in the case, should this recommendation be adopted, because this was not briefed by the parties. The Court may wish to order further briefing if the conviction is vacated.

APPENDIX B

United States District Court,
Southern District of Florida.

Case No. 03-21071-CIV-LENARD/BANDSTRA

John N. GOUDIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER DECLINING TO ADOPT REPORT OF MAGISTRATE JUDGE AND DENYING PETITIONER'S MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE is before the Court on the Report and Recommendation of Magistrate Judge Ted E. Bandstra (D.E.11), issued on August 7, 2003, recommending that the Court grant the Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255, filed by Petitioner John N. Goudie on April 29, 2003. The Government filed Objections on August 22, 2003. (D.E.12.) Petitioner filed his Response to the Government's Objections on September 3, 2003. (D.E.13.) On January 14th and January 16th, 2004, the Court held an evidentiary hearing on the Motion. On February 5, 2004, Petitioner filed his Post-Hearing Memorandum. (D.E.22.) On February 6, 2004, the Government filed its memorandum. (D.E.23.) Having conducted a *de novo* review of the Report, the Objections, and the record, the Court finds as follows.

I. Procedural Background

On July 28, 1997, Petitioner John Goudie was indicted on four counts of conspiracy and money laundering in violation of 18 U.S.C. §§ 371, 1956(h), 1956(a)(1)(A), and 1956(a)(1)(B). (97-582-CR-LENARD (hereinafter "CR"), D.E. 3.) On December 14, 1998, after a ten-week jury trial, Petitioner was convicted on all four counts. (CR, D.E.503.) On May 14, 1998, the Court sentenced

Petitioner to a term of 60 months imprisonment, followed by a three-year term of supervised release. (CR, D.E.699.) Petitioner appealed, and on July 17, 2002, the Eleventh Circuit affirmed his conviction and sentence. (CR, D.E.955.)

On April 29, 2003, Petitioner filed the instant Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel. (D.E.1.) Specifically, Petitioner alleged that his trial counsel failed to communicate a plea offer made to him by the Government prior to trial and that if Petitioner had been told about the plea offer, he would have accepted it. On July 21, 2003, the Magistrate Judge held an evidentiary hearing to determine the validity of Petitioner's claim of ineffective assistance. (D.E.10.) At the hearing, Petitioner John Goudie testified along with his trial counsel, Edward O'Donnell, former United States Attorney Alexander Angueira, co-defendant Julio Marrero, and his brother, Joseph Goudie.

On August 7, 2003, the Magistrate Judge issued his Report and Recommendation in this case. (D.E.11.) On August 22, 2003, the Government filed Objections to the Report (D.E.12) and on September 3, 2003, Petitioner filed his Response to the Government's Objections (D.E.13). On January 14th and January 16th, 2004, the Court held a *de novo* evidentiary hearing on the Motion, the Report, and the Objections. (D.E.19-20.) At that hearing, witnesses who had testified at the July 21, 2004 hearing, including Petitioner, Edward O'Donnell, Alexander Angueira, and Joseph Goudie, testified again. In addition, Jim McMaster, the attorney who represented co-defendant Jose Macia, and Howard Srebnick, the attorney who represented co-defendant Alejandro De Leon, both testified for the first time. Julio Marrero did not testify, but both sides agreed to incorporate the transcript of his testimony at the July 21, 2003 hearing into the record. (1/16/04 Tr. at 13.) At the conclusion of testimony, the Court instructed the parties to present their closing arguments in memorandum form within twenty-one days. *Id.* at 15-16. On February 5, 2004, Petitioner filed his Post-Hearing Memorandum. (D.E.22.) On February 6, 2004, the Government filed its memorandum. (D.E.23.)

II. Factual Background

During the Evidentiary Hearings held on January 14th and 16th, 2004, both former United States Attorney Alexander Angueira and Petitioner's attorney, Edward O'Donnell, testified that they recall discussing the possibility of a plea agreement at the offices of the United States Attorney approximately two weeks prior to the start of trial. (1/14/04 Tr. at 16-18, 30.) Angueira stated that he didn't recall the parameters of the plea that was offered, but knows that it was "a favorable plea." *Id.* at 32. O'Donnell testified that the Government was prepared to allow Petitioner to plead guilty to a misdemeanor and that Petitioner would not be required to serve any time nor would Petitioner be required to testify at trial. *Id.* at 19. O'Donnell testified that he discussed the plea offer with Petitioner the same day or "shortly thereafter." *Id.* at 13, 18. He stated that he told Petitioner about the plea offer in person during a private conversation in either the Tower Building[1] or the James Lawrence King Building of the Federal District Court in Miami. *Id.* at 13. O'Donnell explained that he repeated the plea offer, as it had been described to him: "Believe it or not there is a misdemeanor in Title 18. They are willing to let you plead guilty to a misdemeanor. You will not serve any time John nor will you be required to testify. No time, no testimony." *Id.* at 19. O'Donnell recounted that Petitioner immediately stated: "Ed, why should I plead guilty to anything, I didn't do anything." *Id.* Then, O'Donnell recalled telling Petitioner that he admired his resolve. *Id.*

O'Donnell testified that after his conversation with Petitioner, he let the Government know that Petitioner had decided to go to trial. *Id.* at 23. Angueira recalls that O'Donnell approached him and Assistant United States Attorney Thomas Mulvihill as they were getting off the elevators in the Tower Courthouse and that O'Donnell told them that Petitioner was not going to take the plea and wanted to go to trial. *Id.* at 31. O'Donnell testified that he and Petitioner did not discuss the possibility of a plea offer again. *Id.* at 23.

Petitioner contends that O'Donnell never discussed the possibility of pleading guilty with him and never told him that the

---

[1] The Federal Courthouse located at 301 N. Miami Avenue, Miami, Florida 33128.

Government had offered to allow him to plead guilty to a misdemeanor prior to trial. *Id.* at 50-51. Petitioner testified that he only learned of the misdemeanor plea offer after the trial. *Id.* at 51. Petitioner's brother, Joseph Goudie, testified that he was not aware that Petitioner had ever been offered a plea prior to the jury's verdict. *Id.* at 59. Petitioner testified that he first learned about the misdemeanor plea on the day that the jury rendered its verdict. *Id.* at 51. He stated that he had "a meeting with the prosecution" during which "Mr. Mulvihill asked [him] why didn't [he] accept their offer." *Id.* at 52. Petitioner testified that his response was "what offer?" *Id.* Angueira's recollection of the exchange is very similar. *Id.* at 36-37. He testified that during a recess after the verdict was returned, Petitioner approached Mulvihill and him and asked if there was something that they could do for him. *Id.* at 36. Angueira stated that either he or Mulvihill said something like: "what do you mean, you should have taken the plea." *Id.* Angueira then recalls Petitioner asking them "what plea?" *Id.*

Petitioner further testified that when he was found guilty he asked O'Donnell what kind of sentence he was facing "because [he] had never really talked to anybody [about] what [he]was facing." and that O'Donnell told him that he would call him during the next two weeks and explain the sentencing guidelines to him. *Id.* at 52, 57. Petitioner claims that O'Donnell never called him. *Id.* at 57. He states that his wife asked a friend's husband, an appellate attorney, to come over to the house and explain the Federal Sentencing Guidelines and his possible sentence under the Guidelines to him. *Id.* at 53. He claims that the attorney came and told him that "[he] was looking at ten years of jail." *Id.* Petitioner also states that prior to his conversation with this attorney, he had not been aware of "the ramifications of the case." *Id.* However, Petitioner admitted on cross examination that prior to trial he knew that if he were convicted it would be a "very serious matter," and that he would be going to prison for a long time. *Id.*

Petitioner contends that if the misdemeanor plea offer had been communicated to him by his attorney at the time that it was made, approximately two weeks before the trial started, he would have accepted that offer. *Id.* at 54. He reasons that his "whole thing was not going to jail," and that he definitely would have accepted an offer that meant he wouldn't have had to go to jail or sit through a trial. *Id.*

at 54.

O'Donnell testified that prior to trial Petitioner maintained that he was innocent of the charges against him. *Id.* at 7. O'Donnell further stated that he had discussed with Petitioner the defense he was going to engage in at trial. *Id.* O'Donnell stated that in defending Petitioner he intended to rely on the Government's lack of evidence. *Id.* at 8, 22. Moreover, O'Donnell testified that both he and Petitioner believed that Jose Macia, Petitioner's "good friend" and co-defendant, would testify at the trial and that Macia's testimony would exonerate Petitioner. *Id.* at 8-9. Macia's attorney, James McMaster, also stated that Macia had intended to testify right up until the end of the trial and that he believed that Macia's testimony would have been favorable to Petitioner. *Id.* at 39-40. O'Donnell stated that during and since trial Petitioner has maintained that he didn't do anything wrong and is innocent. *Id.* at 7, 14. Both O'Donnell and Angueira recalled and the record reflects that during his sentencing hearing, on May 11, 1999, Petitioner was asked if there was "any legal cause why the sentence of the law should not be pronounced upon [him]" and he replied, "I am not guilty." *Id.* at 14-15, 32; (*see also* Goudie Sentencing, 5/11/99 Tr. at 2-3).

O'Donnell testified that in the course of his representation of Petitioner, he had informed Petitioner that a guilty verdict would result in Petitioner being a convicted felon and that Petitioner could be sentenced to prison time. *Id.* at 15, 21. However, O'Donnell stated that he never discussed with Petitioner, before or after the plea offer, the specific amount of prison time Petitioner was facing under the Sentencing Guidelines. *Id.* at 20-21. O'Donnell stated that he did not discuss the pleas of any of the other defendants in the case with Petitioner. *Id.* at 23-24. However, he testified that he and his client were present when Humberto Hernandez plead guilty to Count I of the Indictment, but did not recall whether either he or his client were present when Julio Marrero plead guilty to a misdemeanor on September 10, 1998. *Id.* at 10-11, 15-16, 23-24. Marrero testified that he did not see Petitioner in the courtroom when he pled guilty in this case and did not discuss his plea with Petitioner at any time.

(7/21/03 Tr. at 48.)[2] Petitioner does remember seeing Humberto Hernandez plead guilty to Count I of the Indictment[3] and hearing the Court instruct Hernandez on the statutory maximum for that offense and the implications of the Federal Sentencing Guidelines. *Id.* at 55-56; (*see also* Hernandez Change of Plea, 8/27/04 Tr. at 11-15). However, Petitioner stated that at the time he did not really understand what was going on or what Hernandez had pled to. *Id.* at 56.

McMaster testified that he learned that the Government made a misdemeanor plea offer to Petitioner and that Petitioner rejected the offer. *Id.* at 43. He does not recall who told him about the plea offer, but remembers that it was a topic of general conversation among the defense attorneys when they met after court proceedings and during breaks. *Id.* at 42-44. Specifically, McMaster recalls discussing Petitioner's rejection of the plea offer with his client, his wife, the other defense attorneys and some of the other clients "in and out." *Id.* at 44-45. He does not recall whether Petitioner participated in these discussions. *Id.* at 44-45. However, he stated that Petitioner's plea offer and his rejection of it was "a major focus of conversation for a period of time" and that "most of the lawyers couldn't believe Mr. Goudie would pass up the opportunity for a misdemeanor plea, whether he had done anything to justify a misdemeanor plea or not." *Id.* at 44-45. Co-defendant Alejandro De Leon's attorney, Howard Srebnick, also testified that at some point he learned that Petitioner had been offered a plea that would have allowed him to avoid jail

---

[2] Both parties stipulated to the incorporation of Marrero's 7/21/03 testimony into the record of the hearing before this Court on January 16, 2004. (1/16/03 Tr. at 13.)

[3] On cross-examination of Petitioner, U.S. Attorney Mulvihill asked Petitioner if he was there when Hernandez was "sentenced." Petitioner answered "Yes." However, the next question and answer suggest that both Mulvihill and Petitioner are actually referring to Hernandez' plea and not his sentencing. Moreover, the transcript of Humberto Hernandez' Change of Plea on August 27, 1998, indicates that Petitioner was present. (8/27/98 Tr. at 2.)

time. (1/16/04 Tr. at 7.) However, Srebnick does not remember when or from whom he learned this information. *Id.* Furthermore, Srebnick does not remember any specific meetings before trial with the attorneys remaining in the case, the purpose of which was to discuss plea offers that had been extended to clients or plea offers that had been taken by other defendants. *Id.* at 7-8.

III. The Magistrate Judge's Report and Recommendation

In his Report, the Magistrate Judge found that "O'Donnell's performance was unreasonable under prevailing professional norms because of his failure to adequately advise petitioner about the specific terms of the plea offer and the potential consequences of going to trial." (Report at 6.) The Magistrate Judge did not resolve the issue of whether O'Donnell communicated the plea offer to Petitioner. Instead, he found that even if O'Donnell's recollection of events were accurate, O'Donnell's brief explanation of the "no time, no testimony" plea offer was insufficient to allow Petitioner to make an informed decision. *Id.* at 9. The Magistrate Judge found that O'Donnell's failure to discuss the advantages and disadvantages of the offer with Petitioner, to review the Sentencing Guidelines with Petitioner, or to explain to Petitioner the advisability of accepting or rejecting the offer, amounted to constitutionally ineffective assistance of counsel. *Id.* at 9-10.

The Magistrate Judge further found that Petitioner had successfully demonstrated that O'Donnell's "unreasonable acts or omissions prejudiced him." *Id.* at 10. Specifically, the Magistrate Judge determined that a reasonable probability existed that but for O'Donnell's errors, Petitioner would have accepted the plea offer and pled guilty to a misdemeanor. *Id.* In reaching this conclusion, the Magistrate Judge relied on Petitioner's testimony, which he found to be "highly credible." *Id.* at 12 n. 8. In addition, the Magistrate Judge found that O'Donnell's testimony that the offer was "generous" and that he thought that Petitioner was going to be "delighted" with the offer corroborated Petitioner's testimony. *Id.* at 12 (quoting 7/21/03 Tr. at 13-14). Based on these findings, the Magistrate Judge recommended that the Court grant Petitioner's Motion to Vacate, Set Aside, or Correct Sentence. *Id.* at 13.

IV. The Parties' Arguments

In its Objections to the Magistrate Judge's Report, the Government argues that O'Donnell's representation of Petitioner satisfied the effective assistance of counsel standard as contemplated by the Sixth Amendment of the United States Constitution. (Gov't. Obj. at 2.) The Government takes the position that in order to fall below the constitutional standard for communicating a plea offer to a client, an attorney must either fail to advise the client of the existence of the offer, or materially misrepresent its terms. *Id.* at 4. The Government argues that according to O'Donnell's account of events he did neither and that the Magistrate Judge's conclusion that O'Donnell provided ineffective assistance of counsel is incorrect as a matter of law. *Id.* at 6. The Government asserts that in order to find that O'Donnell's conduct amounted to ineffective assistance, the Magistrate Judge created a new constitutional right--the right to be advised in detail as to the significance of a plea offer and to receive a recommendation from counsel about whether or not to accept the offer. *Id.*

The Government contends that O'Donnell related the specifics of the plea offer to Petitioner, as constitutionally required, and that Petitioner was aware of the potential consequences of his refusal to accept. *Id.* The Government asserts that Petitioner knew that he was facing prison time if convicted. *Id.* Petitioner had been present in the courtroom when Humberto Hernandez pled guilty to Count I of the Indictment and heard the Court fully explain the potential penalties, including the applicability of the Sentencing Guidelines to that Count. *Id.* at 6-7. Moreover, the Government argues that an explanation of the Sentencing Guidelines was unnecessary in this case, as the plea offer specified that no jail time would be imposed. *Id.* at 7.

As for the prejudice prong, the Government asserts that Petitioner has failed to offer any evidence, other than his own post-sentencing testimony, that Petitioner would have accepted the Government's plea offer had it been sufficiently explained to him. *Id.* at 9. In fact, the Government argues that all of the uncontradicted evidence points to the opposite conclusion. *Id.* at 9-10. The Government's case against Petitioner was not strong and Petitioner professed his innocence throughout trial and sentencing. *Id.* Based on these facts, the Government contends that Petitioner's decision to

reject the plea offer and to go to trial was simply an ill-advised strategic decision. *Id.* Thus, the Government argues that Petitioner has failed to establish that it is reasonably probable that Petitioner would have accepted the plea offer if it had been more thoroughly explained to him by O'Donnell. *Id.*

In its Post-Hearing Memorandum, the Government reiterates many of the arguments it made in support of its Objections. In addition, the Government asserts that the testimony of James McMaster, Jose Macia's attorney, supports O'Donnell's account of events. (Gov't Post-Hearing Memo. at 6-7.) The Government points out that: (1) McMaster testified that he was aware of the plea offer extended to Petitioner by the Government and that the offer was a matter of general discussion in meetings between defense attorneys; and (2) McMaster also stated that Julio Marrero's plea to a misdemeanor was the subject of a joint defense strategy meeting. *Id.* at 6, 9. Furthermore, the Government asserts that the fact that Petitioner retained and continued to pay O'Donnell for months after the verdict, belies Petitioner's claim that O'Donnell failed to disclose the plea offer. *Id.* at 10.

In his Response to the Government's Objections, Petitioner asserts that the Magistrate Judge reached the proper conclusion in his Report and Recommendation. (Response at 1-2.) Petitioner also argues that the Government's Objections to the Report were untimely. [4] *Id.*

---

[4] Having reviewed Government's Exhibit 2, introduced at the evidentiary hearing held on January 16, 2004, the Court finds that the Government's Objections were timely. Government's Exhibit 2 is a copy of the fax cover sheet attached to the Magistrate Judge's Report and Recommendation, dated August 8, 2004. Pursuant to 28 U.S.C. § 636(b)(1)(C), the Government had 10 days from receipt of the Report within which to file objections. Computing the 10 days pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, the Government had until August 22, 2004, to file its objections. The Court's docket indicates that the Government night-box filed its Objections on August 22, 2004.

In his Post-Hearing Memorandum, Petitioner once again argues in favor of the reasoning and conclusions reached by the Magistrate Judge. Petitioner takes the position that criminal defense attorneys have a duty not only to inform their clients of all plea offers made by the prosecution, but also to "be involved in the decision-making process regarding the agreement's ultimate acceptance or rejection" and to explain to their clients the possible consequences of their decision. (Petitioner's Post-Hearing Memo. at 2-3.) Petitioner defines counsel's duty under *Strickland* as the responsibility "to ensure that the client has all the important facts and law to consider, and for counsel to actually advise the client of a prudent course of action." *Id.* at 3. Petitioner further asserts that in order to fulfill this duty, a defense attorney must explain the maximum sentencing exposure the client would be facing should he or she choose to go to trial. *Id.* at 4-5.

Petitioner argues that O'Donnell never told him about the misdemeanor plea offer extended by the Government approximately two-weeks before this case went to trial. *Id.* at 10. Moreover, even if O'Donnell's account of events were to be believed, Petitioner contends that because O'Donnell did not get the plea offer in writing, did not attempt to calculate Petitioner's possible exposure under the Sentencing Guidelines, did not "explain the benefits of a 'plea of convenience,' " and did not "hammer into [Petitioner] the critical significance of the plea offer," O'Donnell's conduct fell below the constitutional standard for effective assistance of counsel. *Id.* at 7-8. Petitioner also contends that if he had been properly informed of the plea offer, he would have accepted that offer. *Id.* at 10. Petitioner argues that his statements that he was innocent of the charges both during trial and at sentencing are not evidence that he would not have taken the plea offer. *Id.* at 12. Instead, he takes the position that it is common for innocent people to enter into plea agreements in order to avoid jail time. *Id.* In addition, Petitioner argues that his continued retention and payment of O'Donnell for several months after allegedly learning about the plea offer demonstrates only that he is an honest person who honors his debts. *Id.* at 13. In conclusion, Petitioner argues that "it defies logic for one to assume that [Petitioner] would not have taken such an incredibly generous offer" and the more likely scenario is that O'Donnell was convinced that Petitioner would not want to plead and "cavalierly rejected" the offer without consulting

his client. *Id.*

V. Analysis

A. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that (1) "counsel's performance was deficient" because it "fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof remains on the petitioner throughout a habeas corpus proceeding. *Roberts v. Wainwright*, 666 F.2d 517, 519 n. 3 (11th Cir.1982.) A court may decline to reach the performance prong of the *Strickland* test if it finds that the prejudice prong cannot be satisfied. *Id.* at 697, 104 S.Ct. 2052; *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir.1995). To satisfy the prejudice prong, Petitioner must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The *Strickland* Court recognized that the standard must be "highly deferential," and that a court reviewing an ineffective assistance of counsel claim, must "indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." 466 U.S. at 689, 104 S.Ct. 2052. The Supreme Court has applied the two-part *Strickland* analysis to challenges of guilty pleas based on ineffective assistance of counsel, *Hill v. Lockhart*, 474 U.S. 52, 56-57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), and the Eleventh Circuit has extended it to ineffective assistance claims made by defendants who rejected guilty pleas, *Coulter v. Herring*, 60 F.3d 1499, 1504 n. 7 (11th Cir.1995).

1. Objective Performance Prong

In order to satisfy the performance prong of the *Strickland* analysis, Petitioner must demonstrate that O'Donnell "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 104 S.Ct.

2052. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688, 104 S.Ct. 2052. According to the *Strickland* opinion, one of the basic duties of a criminal defense counsel is "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* It is clear that where the prosecution has proffered a plea agreement, a defense attorney must inform his client about the proposed plea agreement, and that failure to do so constitutes ineffective assistance of counsel. *Diaz v. United States*, 930 F.2d at 834; *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir.1986). However, the Court does not find that O'Donnell failed to inform Petitioner about the plea offer in this case.

At the hearing before Magistrate Judge Bandstra, Petitioner testified that O'Donnell never told him about the misdemeanor plea offer extended by the Government prior to trial. (1/14/04 Tr. at 50-51.) However, the Magistrate Judge did not credit that portion of Petitioner's testimony in his Report. (Report at 7.) Instead, the Magistrate Judge relied on O'Donnell's account of events and assumed that O'Donnell had told Petitioner about the plea offer. *Id.* Moreover, in his Objections to the Magistrate Judge's Report Petitioner did not object to the Magistrate Judge's findings and conclusions based on the premise that O'Donnell had informed Petitioner about the plea offer. (Response to Gov't Objections at 2)("The evidence clearly shows that Mr. O' Donnell only discussed the proposed plea agreement with Petitioner in the hallway or lobby of the Federal Courthouse and that said discussion was very brief.")

During the January 14, 2004 Evidentiary Hearing before the Court, Petitioner again testified that O'Donnell never told him about the plea offer. (1/14/04 Tr. at 52.) He also recounted the conversation between himself and prosecutors Angueira and Mulvihill that occurred during the break immediately following the jury verdict in this case *Id.* at 50-52. Petitioner, Petitioner's brother, and Angueira all testified that sometime after the jury verdict was read, Petitioner approached prosecutors Angueira and Mulvihill and asked them if there was something they could do for him. *Id.* at 36-37, 50-52, 59. When one of the prosecutors responded that Petitioner should have taken the plea offer, Petitioner replied "what offer?" *Id.* Petitioner suggests that his reaction to the prosecutor's question supports his contention that he

had not previously heard about the misdemeanor plea offer. (Petitioner's Post-Hearing Memo. at 9-10.) However, the Court disagrees. Petitioner's question is ambiguous at best. Having just learned of the jury's verdict, Petitioner simply may have been confused. He may not have immediately recalled an offer that had been made and rejected months earlier[5] and his question might simply have been a request for clarification. No one, including Petitioner, recalls any further discussion of the plea offer on that occasion. Moreover, there is no evidence that Petitioner ever tried to contact the prosecutors about the plea offer after that day.

Having reviewed all of the evidence in this case in light of the strong presumption that O'Donnell's conduct fell within the wide range of reasonable professional assistance, *see Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, the Court finds that Petitioner's testimony that O'Donnell never informed him about the misdemeanor plea offer is not credible. According to former Assistant United States Attorney Angueira, O'Donnell told Angueira that he would discuss the plea offer with his client and later stated that his client had instructed him to refuse the offer. (1/14/04 Tr. at 30-31.) If Petitioner's testimony is true, then O'Donnell not only withheld information about the plea offer from his client, he also deceived the Government. Petitioner suggests that O'Donnell "cavalierly" rejected the plea offer without consulting Petitioner either because he did not have an opportunity to discuss the plea with Petitioner or because he wanted to push the matter to trial based on his belief that Petitioner would be acquitted at trial. *Id.* at 22. Neither explanation is convincing. There is no reason to believe that O'Donnell did not have an opportunity to discuss the plea offer with his client. According to Angueira, Petitioner was present in the lobby outside the courtroom when O'Donnell communicated Petitioner's rejection of the plea to Angueira and Mulvihill. *Id.* at 31. O'Donnell certainly could have discussed the plea offer with Petitioner at that time, if he had not found an earlier opportunity to do so. Petitioner's second explanation is just as incredible. Even if O'Donnell believed that Petitioner would be acquitted, there is no evidence to suggest that O'Donnell preferred

---

[5] The trial in this case lasted 10 weeks.

taking the matter to trial rather than resolving it through a favorable plea bargain.[6] In fact, O'Donnell testified that although he believed that Petitioner would be acquitted at the time the plea offer was made, his confidence in Petitioner's success at trial was not overwhelming "because [he] know[s] that anything can happen in a court of law." *Id.* at 22. Finally, the Court finds that Petitioner's testimony that he remained ignorant of the misdemeanor plea offer prior to and throughout trial is not credible in light of McMaster's testimony that Petitioner's plea offer and his decision to reject it "was a major focus of conversation [out in the hallway and the courtroom] for a period of time." *Id.* at 43-45.[7] It is hard to believe that during the course of a 10-week trial, Petitioner managed to avoid learning about a plea offer that was the subject of hallway chatter among his co-defendants and their attorneys.

The Court further finds that O'Donnell's testimony that he communicated the misdemeanor plea offer to his client is credible. O'Donnell's memory of his discussion with Petitioner regarding the plea offer is specific. Although this discussion occurred more than six years ago, O'Donnell recalls not only what was said, but approximately when and where the conversation took place, whether

---

[6] O'Donnell testified that his fee for representing Petitioner in this matter was $80,000. (1/14/04 Tr. at 5.) Petitioner has not presented any evidence to suggest that O'Donnell's fee amount was affected by Petitioner's decision to go to trial, rather than accept a plea agreement.

[7] McMaster testified that after court appearances, the attorneys in the case would get together "to discuss what was going to happen or what just happened and go from there." He stated that he became aware of the plea offer during one of those meetings. (1/14/04 Tr. at 43-45.) In addition, Howard Srebnick, who represented another one of Petitioner's co-defendants, testified that he learned about the plea offer extended to Petitioner "at some point," but was unsure when he became privy to the information and from what source.(1/16/04 Tr. at 7.)

it was in person or on the telephone and who else was present.[8] Moreover, at the time the plea offer was made, Petitioner knew that the case against him was weak and believed that Macia would testify and exonerate him. *Id.* at 8-9, 22. Finally, throughout the trial and sentencing in this case, Petitioner maintained that he was innocent of the charges against him. Thus, it is credible that when presented with the terms of the plea offer, Petitioner rejected the plea in the manner described by O'Donnell. Based on the foregoing credibility

---

[8] During direct examination, O'Donnell testified as follows:
Q. What were the terms of the plea offer that Mr. Angueirra [sic] had communicated to you?
A. Entrance of a plea to a misdemeanor with no time being served by Mr. Goudie in the trial of Mr. Macia and the co-defendant.
Q. How soon after receiving this plea offer did you communicate those terms to your client?
A. Soon. It might have been the same day.
Q. In person or on the telephone?
A. In person.
Q. Do you recall where you communicated it?
A. I have a recollection of it being either in this building or in the James Lawrence King Building.
Q. Was anyone else present?
A. No....
Q. What advice did you give your client, Mr. Goudie, regarding the plea offer?
A. I told him I met with Mr. Angueirra [sic] and he had told me guess what, there is a misdemeanor in Title 18 and we are willing to offer it to John and he won't serve any time and it will not require him testifying [sic] in this trial. I said I will certainly communicate it to him.
Q. What did Goudie say in response to your communicating the offer to him?
A. He said Ed, why should I plead guilty to anything, I didn't do anything...
(1/14/04 Tr. at 13-14.)

determinations, the Court finds that Petitioner was told about the misdemeanor plea offer prior to trial.

The Court now turns to the question of whether or not O'Donnell's performance in communicating the plea offer to Petitioner violated Petitioner's Sixth Amendment right to counsel. The case law does not clearly define how much and what kind of information must be conveyed to a defendant in order to satisfy the performance prong of the *Strickland* standard. In *United States v. Day*, 969 F.2d 39, 43 (3d Cir.1992), the Third Circuit found that a criminal defendant who rejected a plea offer based upon his attorney's grossly inaccurate assessment of his potential sentence exposure had received ineffective assistance of counsel. Several Circuits, including the Eleventh, have since held that a defense attorney's unreasonably inaccurate advice to his or her client related to accepting or rejecting a proposed plea agreement can rise to the level of ineffective assistance. *See e.g., United States v. Gordon*, 156 F.3d 376, 380 (2d Cir.1998)("By grossly underestimating Gordon's sentencing exposure in a letter to his client, Dedes breached his duty as a defense lawyer in a criminal case..."); *Meyers v. Gillis*, 142 F.3d 664, 667 (3d Cir.1998)(finding that counsel was ineffective where he provided his client with erroneous information about parole eligibility); *Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir.1995)(holding that attorney was ineffective where he mistakenly informed his client that his state and the remainder of his federal term of imprisonment would be served concurrently); *cf. Jones v. United States*, 178 F.3d 790, 794 (6th Cir.1999)(concluding that an attorney, who had not been informed of his client's criminal history, was not ineffective where he failed to explain that any prior offenses might be used to enhance his client's sentence).

In the instant case, Petitioner did not receive unreasonably inaccurate advice or misinformation about the terms of the plea offer. Instead, the Magistrate Judge concluded that Petitioner had received ineffective assistance of counsel based on his finding that O'Donnell had failed to adequately advise petitioner about the terms of the plea offer and the potential consequences of going to trial. (Report at 6.) Specifically, the Magistrate Judge cited O'Donnell's failure to discuss the advantages and disadvantages of the offer with Petitioner, to review the Sentencing Guidelines with Petitioner, or to explain to Petitioner the advisability of accepting or rejecting the offer. *Id.* at 9-10. In reaching this conclusion, the Magistrate Judge relied

primarily on the Second Circuit's holding in *Boria v. Keane*, 99 F.3d 492, 496-98 (2d Cir.1996), that defense counsel's failure to discuss the advisability of accepting or rejecting a plea offer with his client constituted ineffective assistance of counsel. However, in *Purdy v. United States*, 208 F.3d 41, 46 (2d Cir.2000), the Second Circuit limited its holding in *Boria* to the facts of that case. To reach its conclusion, the Second Circuit relied on the fact-specific nature of the *Strickland* inquiry. *Id.* at 48.

> The *Strickland* Court...repeatedly emphasized that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances," that a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case," and that "[t]here are countless ways to provide effective assistance in any given case."

Id. (quoting *Strickland*, 466 U.S. at 688-90, 104 S.Ct. 2052 (citations omitted)). The *Purdy* Court observed that "[t]he *Boria* court's task was to determine the parameters of 'a criminal defense lawyer's duty when a defendant's best interests clearly require that a proffered plea bargain be accepted, but the defendant, professing innocence, refuses to consider the matter.' " *Id.* at 46. Distinguishing the facts of *Purdy* from those of *Boria*, the Second Circuit held that an attorney's failure to explicitly tell a client whether or not he should accept a plea offer does not constitute ineffective assistance of counsel, where the attorney "informed [his client] at length and on several occasions of the strength of the government's case," where the defendant was "a sophisticated businessman, [who] understood that the case against him was formidable," where the defendant's best interests did not necessarily demand a guilty plea, and where the defendant's "decision not to plead guilty was based on a rational calculation." *Id.* at 46-47.

In the instant case, O'Donnell testified that his discussion with Petitioner regarding the misdemeanor plea offer was brief. *Id.* at 13, 18. He explained that he repeated the plea offer, as it had been described to him: "Believe it or not there is a misdemeanor in Title 18. They are willing to let you plead guilty to a misdemeanor. You will not serve any time John nor will you be required to testify. No time, no testimony." *Id.* at 19. O'Donnell recounted that Petitioner

immediately stated: "Ed, why should I plead guilty to anything, I didn't do anything." *Id.* O'Donnell recalls telling Petitioner that he admired his resolve. *Id.* O'Donnell testified that in the course of his representation of Petitioner, he had informed Petitioner that a conviction would probably result in a prison sentence. *Id.* at 15, 21. O'Donnell admitted that he never discussed with Petitioner, before or after the plea offer, the specific amount of prison time Petitioner was facing under the Sentencing Guidelines. *Id.* at 20-21. However, Petitioner testified that prior to trial he knew that if he were convicted it would be a "very serious matter," and that he would be going to prison for a long time. *Id.* at 53.

It is clear from O'Donnell's testimony that he informed Petitioner of the plea offer and explained its terms. He did not mislead or misinform Petitioner. However, it is equally clear that the conversation was brief and that O'Donnell neither explained how the Federal Sentencing Guidelines would apply to Petitioner if he were convicted at trial, nor advised Petitioner on how he should respond to the plea offer.[9] The question before the Court is whether these omissions constitute ineffective assistance of counsel in violation of the Sixth Amendment.

In *Boria*, the Court held that a defense counsel's failure to discuss the advisability of accepting or rejecting a plea offer with his client constituted ineffective assistance of counsel. 99 F.3d at 497. However, in that case, the Court was confronted with a situation where "a defendant's best interests clearly require[d] that a proffered plea bargain be accepted, but the defendant, professing innocence, refuse[d] to consider the matter." *Id.* at 496. As the Second Circuit observed in *Purdy*, the *Boria* Court did not fashion a *per se* rule that a defense counsel must advise a client whether or not to plead guilty. 208 F.3d at 46.

---

[9] The Court can only speculate how O'Donnell would have advised his client, had he offered advice. O'Donnell testified that he believed at the time that they would win the case. (1/14/04 Tr. at 22.) However, he also testified that he did not have an overwhelming belief that they would win "because [he] know[s] anything can happen in a court of law.". *Id.*

The facts of the instant case are distinguishable from those of *Boria*. Like Boria, Petitioner has consistently maintained that he is innocent of the charges against him. (1/14/04 Tr. at 7, 14-15.) In rejecting the plea offer, Petitioner specifically stated that he "didn't do anything." (*Id.* at 19.) Moreover, the misdemeanor plea offer was certainly favorable and its advantages should have been self-evident, even to a lay person like Petitioner. However, at the time O'Donnell presented the misdemeanor plea offer to Petitioner, O'Donnell was optimistic about Petitioner's chances at trial. (*Id.* at 22.) O'Donnell testified that he believed that the Government had little or no evidence against Petitioner. *Id.* He also stated that he expected co-defendant Macia to testify at trial and exonerate Petitioner. *Id.* at 8-9. Thus, the Court does not find that Petitioner's best interests clearly required that he accept the proffered plea agreement. Furthermore, O'Donnell testified that he had told Petitioner that his primary defense would be that the Government had very little evidence implicating Petitioner. *Id.* at 7-8. Thus, there is every reason to believe that rather than "refus[ing] to consider the matter," as Boria had, Petitioner considered the plea offer and rejected it based on a calculation that he would be acquitted at trial.

In *Purdy*, the petitioner claimed ineffective assistance based, in part, on his attorney's alleged failure to explicitly advise him to accept a guilty plea. 208 F.3d at 42. In that case, the Court focused on "whether counsel's assistance was reasonable considering all the circumstances." 208 F.3d at 46-48 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). In doing so, the Court examined factors such as: (1) the sophistication of the defendant and the information he had about the case against him, (2) the strength of the prosecution's case, and (3) whether the decision to plea or not was based on a rational calculation. *Id.* at 47. Considering the facts of that case, the *Purdy* Court held that the attorney "acted reasonably when he informed Purdy fully of the strength of the government's case against him, together with the nature of the government's plea offer, without specifically advising Purdy to take the plea." *Id.* at 48. In *Turner v. Calderon*, 281 F.3d 851, 880-81 (9th Cir.2002), the Ninth Circuit took a similar approach to a case in which a petitioner admitted that he had been informed about a plea offer, but claimed that his attorney had failed to counsel him on the consequences of going to trial and had failed to discuss in detail the significance of the plea agreement

offered. In that case, the Ninth Circuit stated that "[a] defendant has the right to make a reasonably informed decision whether to accept a plea offer," but found that the petitioner in that case had the information he needed to make his decision. *Id.* at 881; *see also Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir.1984) ("[C]ounsel need only provide his client [who is considering a plea offer] with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial.")

The Court finds that Petitioner's decision to reject the Government's plea offer was an informed decision. O'Donnell repeated the terms of the misdemeanor plea offer to Petitioner exactly as they had been explained to him by Angueira. (1/14/04 Tr. at 19.) Petitioner knew that if he accepted the plea, he would not serve prison time and would not be required to testify against co-defendants. *Id.* Moreover, Petitioner admits that he knew that a conviction in this case would be "a very serious matter" and that he would be going to prison for a long time. *Id.* at 56. It is undisputed that Petitioner and O'Donnell discussed trial strategy and the Government's case against Petitioner prior to trial. (1/14/04 Tr. 7-8.) O'Donnell testified that he had told Petitioner that the Government's case against him was weak and that O'Donnell's defense of Petitioner would focus on the Government's lack of evidence. *Id.* at 7-8. There is no reason to doubt O'Donnell's evaluation of the strength of the case particularly when the Government acknowledges in its Objections to the Magistrate's Report and Recommendation that "the testimonial and documentary evidence introduced against [Petitioner] was far from voluminous." (Government's Objections at 9.) Furthermore, Petitioner was present in the courtroom when co-defendant Humberto Hernandez pled guilty to Count I of the Indictment and the Court informed Hernandez that the maximum possible penalty of confinement for the offense was five years imprisonment. (*Id.* at 55-56; *see also* Hernandez Change of Plea, 8/27/98 Tr. at 2, 11.)[10]

---

[10] Petitioner admits and the Court transcript reflects that Petitioner attended Humberto Hernandez' Change of Plea hearing held on August 27, 1998. (1/14/04 Tr. at 55-56;

Petitioner in the instant case is a sophisticated businessman. (*See* 7/21/03 Tr. at 36-38) (Petitioner testified that he finished three years of college at the University of Houston and the University of Miami, that he studied for and passed an examination to become a state-certified real estate broker and that he has completed 30 hours of continuing education in his field every year since, including training in real estate legal principles). At the time he rejected the plea offer, he had information about the Government's case against him and understood his attorney's reasonable assessment of the strength of that case. Moreover, Petitioner has consistently and continually maintained that he is innocent of the charges against him. (1/14/04 Tr. at 7, 14.) In light of these facts, the Court finds that Petitioner's decision to reject the misdemeanor plea offer was based on his rational calculation that he was innocent and would be acquitted at trial. The Court further finds that O'Donnell's conduct was reasonable under the circumstances. He believed that Petitioner had an adequate understanding of the case against him, the terms of the plea offer, and the possible consequences of his decision to reject that offer. Thus, O'Donnell's failure to advise Petitioner regarding whether or not he should accept the Government's plea offer did not constitute ineffective assistance of counsel.

The Magistrate Judge also based his recommendation on O'Donnell's failure to explain to Petitioner the minimum and maximum sentences he was facing under the Federal Sentencing Guidelines. (Report at 8.) The Magistrate Judge relied on three cases which discuss in dicta an attorney's duty to provide a criminal defendant with information regarding possible sentencing exposure when advising that defendant about a plea offer. *Day*, 969 F.2d at 43; *Gordon* 156 F.3d at 380 (quoting *Day*); *Slevin v. United States*, 71 F.Supp.2d 348, 354-55 (S.D.N.Y.1999) *aff'd* 234 F.3d 1263, 2000 WL 1528655 (2d Cir.2000) (unpublished opinion). In all three cases, the courts found or declined to find a constitutional violation based on whether or not the attorney in question had provided the petitioner

---

Hernandez Change of Plea, 8/27/98 Tr. at 2.) During the hearing, the Court listed the defendants who were named in Count I of the Indictment. That list included Petitioner. (8/27/98 Tr. at 6.)

with "grossly inaccurate" or seriously misleading advice about sentencing exposure at trial. *Day*, 969 F.2d at 42-44 (finding ineffective assistance where counsel advised defendant before trial that defendant faced a maximum sentence of 11 years, defendant turned down a plea offer of five years and ended up receiving a twenty-two year sentence upon conviction); *Gordon*, 156 F.3d at 377, 380 (finding ineffective assistance where the maximum sentence defendant faced after trial was 12 to 17 years greater than the estimate he received from his attorney prior to trial); *Slevin*, 71 F.Supp.2d at 351, 355 (declining to find ineffective assistance but stating that defendant's allegations, if true, would amount to ineffective assistance where defendant turned down plea offer of two years, received a six and a half year sentence after trial, and claimed that his counsel had advised him before trial that he was facing a maximum three year sentence). In the instant case, Petitioner does not allege that he was misinformed about the terms of the plea agreement or about his sentencing exposure should he reject the plea and proceed to trial. Thus, the facts, here, are distinguishable from the facts of *Day*, *Gordon* and *Slevin*. Furthermore, these cases rely on the same underlying principle expressed by the *Purdy* and *Turner* Courts--a criminal defendant is entitled to his attorney's assistance in making a "reasonably informed decision whether to accept a plea offer." *Day*, 969 F.2d at 43. For all of the reasons previously discussed, the Court finds that Petitioner's decision to reject the misdemeanor plea offer was an informed decision.

In *Day*, the Third Circuit observed that "[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." 969 F.2d at 43. The Court agrees that in advising a client whether to accept a plea offer, a criminal defense attorney should evaluate and consider that client's sentencing exposure under the Federal Sentencing Guidelines. Certainly, it would have been preferable if O'Donnell had discussed the Guidelines and Petitioner's possible sentencing exposure under those Guidelines with Petitioner when presenting the plea offer to him. However, the issue before the Court is whether O'Donnell's representation of Petitioner fell below an "objective standard of reasonableness" based on "prevailing professional norms." *Strickland*, 466 U.S. 668, 104 S.Ct. 2052. The Court finds that it did not.

In *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir.1984), the Eleventh Circuit made the following observation:

> The right to competent plea bargain advice is at best a privilege that confers no certain benefit, unlike the fifth amendment's bar to admission of involuntary confessions. An accused may make a wise decision even without counsel's assistance, or a bad one despite superior advice from his lawyer. The Supreme Court has commented that the unpleasant choice is one the defendant ultimately must make for himself, and that the decision is often inescapably grounded on uncertainties and a weighing of intangibles.

748 F.2d at 1508. In the instant case, Petitioner made a decision based on his belief in his own innocence, his understanding of the case against him, and his attorney's assessment of the strength of that case. He understood the terms of the misdemeanor plea offer and the consequences of a guilty verdict and he took a calculated risk. He now regrets that decision and blames his misstep on inadequate advice from his attorney. However, the Court finds that O'Donnell's representation of Petitioner in connection with the Government's plea offer was reasonable in light of the paucity of evidence against Petitioner, the possibility that Macia's testimony would exonerate Petitioner at trial, and Petitioner's protestations of innocence. O'Donnell did not misinform Petitioner about the plea or the consequences of refusal, nor did he remain silent while believing his client's decision to be "suicidal." (*See Boria*, 99 F.3d at 495). He merely accepted his client's rational decision to refuse a favorable plea offer. Based on the foregoing facts and analysis, the Court finds that O'Donnell's representation of Petitioner with respect to the Government's misdemeanor plea offer was reasonable in light of prevailing professional norms and does not constitute ineffective assistance of counsel under *Strickland*.

ii. Prejudice Prong

Even assuming that Petitioner had satisfied the performance prong of the *Strickland* analysis, the Court finds that he has failed to demonstrate that he was prejudiced by O'Donnell's alleged errors. In

order to demonstrate prejudice, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The *Strickland* Court defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* Petitioner cannot show prejudice simply by asserting in hindsight that he would have accepted a plea agreement had it been properly presented to him. *Diaz*, 930 F.2d at 835; *Johnson v. Duckworth*, 793 F.2d 898, 902 n. 3 (7th Cir.1986) (noting that petitioner's statements alone do not establish a reasonable probability that he would have accepted the plea). Petitioner must offer the Court objective evidence in order to satisfy the prejudice prong of the *Strickland* analysis. *Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir.1998); *Gordon*, 156 F.3d at 381. In *Cullen v. United States*, 194 F.3d 401 (2d Cir.1999), the Second Circuit described the factors a court might consider in evaluating a similar claim of prejudice as follows:

> In determining whether Cullen has shown a reasonable probability that he would have accepted the plea bargain if he had been informed of its terms, the factfinder will primarily have to make a determination of Cullen's credibility. Though a claim that he would have accepted the plea would be self-serving (like most testimony by witnesses who are parties), it ought not to be rejected solely on this account. In assessing Cullen's credibility, the fact-finder would be entitled, but not required, to consider Cullen's continued protestation of innocence as weighing against the credibility of his claim, and to regard the disparity between the guideline range he faced and the range as represented by defense counsel as another factor bearing upon his credibility. The credibility determination should be based on all relevant circumstances.

Cullen, 194 F.3d at 407-408 (citing *Gordon*, 156 F.3d at 381) (reversing the district court's finding that petitioner had failed to demonstrate prejudice and remanding the case for a hearing on that issue).

In the instant case, Petitioner testified that he would have accepted the misdemeanor plea offer, had he known about it. (1/14/04

Tr. at 54.) As the Court has already found that O'Donnell told Petitioner about the plea offer prior to trial and that Petitioner rejected the offer in the manner described by O'Donnell, the question before the Court is whether or not Petitioner would have accepted the plea offer if O'Donnell had more thoroughly explained Petitioner's sentencing exposure upon conviction and/or if O'Donnell had advised Petitioner to accept the plea offer.

In his Report, the Magistrate Judge found that Petitioner had established a reasonable probability that he would have accepted the offer if properly conveyed, based on Petitioner's own statements that he would have taken the offer, along with O'Donnell's testimony that the plea offer was "generous" and that he thought Petitioner would be "delighted" with the offer. (Report at 12) (citing 7/21/03 Tr. at 13-14, 31, 35). The Court disagrees.

The Court does not find Petitioner's statements that he would have accepted the plea offer credible. Petitioner's testimony is self-serving and his continued protestations of innocence weigh heavily against his credibility on this issue. Moreover, the Court has already found that Petitioner's testimony that he was not informed of the plea offer is not credible and that finding casts doubt on the remainder of Petitioner's testimony. Furthermore, the instant case is unlike *Cullen* and *Gordon* in that it does not involve allegations that Petitioner received incorrect or misleading information from his attorney concerning his sentencing exposure under the Guidelines. *See Gordon*, 156 F.3d at 380 (finding ineffective assistance where the maximum sentence defendant faced after trial was 12 to 17 years greater than the estimate he received from his attorney prior to trial); *Cullen*, 194 F.3d at 402 (involving allegations that defense counsel advised petitioner prior to trial that his sentencing exposure under the guidelines would be approximately 57-71 months and petitioner was actually sentenced to 136 months). In fact, there is little if any disparity between Petitioner's actual sentence and his sentencing exposure as he understood it at the time he rejected the misdemeanor plea offer. Although O'Donnell did not specifically discuss with Petitioner the minimum and maximum sentences Petitioner might receive upon conviction, Petitioner admits that he knew that he would go to prison

for a long time if he were convicted.[11] *Id.* at 56. Moreover, Petitioner was present when co-defendant Hernandez was informed by the Court that the maximum possible penalty for the offense described in Count I of the Indictment[12] was five years imprisonment. (8/27/98 Tr. at 11.)

The Court finds that Petitioner has not offered any objective evidence that he would have accepted the misdemeanor plea offer if O'Donnell had more thoroughly explained Petitioner's sentencing exposure upon conviction or if O'Donnell had advised Petitioner to accept the plea offer. In light of Petitioner's continued protestations of innocence and absent objective evidence, the Court finds that Petitioner has failed to demonstrate a reasonable probability that he would have accepted the offer if it had been properly presented by O'Donnell, and cannot satisfy the prejudice prong of the *Strickland* analysis.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Court **DECLINES TO ADOPT** the Report and Recommendation (D.E.11), issued on August 7, 2003, by Magistrate Judge Ted E. Bandstra.

2. The Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255, filed April 29, 2003, by Petitioner John N. Goudie, is **DENIED**.

3. This case is **CLOSED**.

4. All pending motions not otherwise ruled upon by separate order are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers in Miami, Florida this 21st day of June, 2004.

JOAN A. LENARD
UNITED STATES MAGISTRATE JUDGE

---

[11] As the Court has previously stated, Petitioner was aware of the weaknesses of the Government's case against him, he believed that Macia would testify and exonerate him, and he steadfastly professed his innocence of the charges against him. (1/14/04 Tr. at 7-9, 22.)

[12] Petitioner was also named in Count I of the Indictment. (8/27/98 Tr. at 6.)